No. 03-54

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IN THE

# Supreme Court of the United States

WIEN & MALKIN LLP, as Supervisor and PETER L. MALKIN, individually and as Partner in and on behalf of EMPIRE STATE BUILDING ASSOCIATES, EMPIRE STATE BUILDING COMPANY, FIFTH AVENUE BUILDING ASSOCIATES, 200 FIFTH AVENUE ASSOCIATES, NAVARRE-500 BUILDING ASSOCIATES, 500-512 SEVENTH AVENUE ASSOCIATES, MARLBORO BUILDING ASSOCIATES, 1359 BROADWAY ASSOCIATES, 112 WEST 34TH STREET ASSOCIATES, 112 WEST 34TH STREET COMPANY, SEVENTH AND THIRTY-SEVENTH BUILDING ASSOCIATES, 501 SEVENTH AVENUE ASSOCIATES, 60 EAST 42ND STREET ASSOCIATES, LINCOLN BUILDING ASSOCIATES, 250 WEST 57TH STREET ASSOCIATES, FISK BUILDING ASSOCIATES, 1333 BROADWAY ASSOCIATES, 1350 BROADWAY ASSOCIATES, and 1400 BROADWAY ASSOCIATES,

*Petitioners*,

—against—

HELMSLEY-SPEAR, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over the state court judgment, pursuant to 28 U.S.C. § 1257(a), where Petitioners failed to properly set up their claimed federal right (specifically, the application of the Federal Arbitration Act (the "FAA")) during a four year arbitration and related state court proceeding, where Petitioners affirmatively litigated under the New York State court's arbitration rules and procedures, and where Petitioners first raised the applicability of the FAA as an afterthought after they had lost the arbitration?

2. Whether, even if the FAA applied, the findings of the arbitration panel (which included a former United States Attorney General) as embodied in a comprehensive 134-page arbitration award were in "manifest disregard of the law"?

## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Helmsley-Spear, Inc. submits that it has no parent company, and that no publicly held company owns 10% or more of its stock.

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Respondent, Helmsley-Spear, Inc., respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Decision and Order of the Supreme Court, Appellate Division, of the State of New York. That Decision and Order is reported at 300 A.D.2d 32, 751 N.Y.S.2d 21 (1st Dep't 2002).

## STATEMENT OF THE CASE

Respondent Helmsley-Spear, Inc. ("Helmsley-Spear"), the well-known real estate management firm, is the managing agent of several commercial buildings in New York City that were the subject of the underlying arbitration and lawsuit (the "Buildings"). In a comprehensive 134-page arbitration award (the "Award"), a panel of distinguished arbitrators (the "Panel")—which included former United States Attorney General Nicholas deB. Katzenbach—denied the claims of petitioners Wien & Malkin LLP and Peter L. Malkin ("Petitioners") to terminate Helmsley-Spear as the managing agent of the Buildings—both for "cause" and without cause by vote of the partnerships that own or operate the Buildings. Properly refusing to second-guess the factual and legal determinations of the Panel, the lower court denied Petitioners' motion to vacate that portion of the Award that denied their "without cause" claims. (Petitioners properly elected not to challenge the Panel's findings that Petitioners failed to prove that Helmsley-Spear should be terminated for cause.)

In light of the comprehensive nature of the Award, no detailed factual recitation is required here. Rather, Respondent respectfully refers this Court to the carefully considered analysis—both factual and legal—of the Panel. (R 88-227.) We do, however, briefly address the underpinnings of two issues that Petitioners contend are "central" to their lower court appeals: (i) the Panel's upholding

of a voting agreement between Helmsley-Spear and Leona Helmsley, whereby Mrs. Helmsley agreed to vote against the termination of Helmsley-Spear as managing agent (the "Voting Agreement"); and (ii) the Panel's upholding of an alleged assignment to Helmsley-Spear of certain property management contracts. (*See* Petition at 3.) The Panel fully considered these issues.

Petitioners contended that the Voting Agreement was an invalid transfer of voting rights to a non-partner in violation of New York partnership law. (Petition at 3-4.) The contested issue of the Voting Agreement's validity was squarely presented to the Panel. (*See* R. 1347-49; R. 1447-48.) The Panel unambiguously addressed and resolved the issue:

> As a part of the transaction under which the option agreement was exercised, Mrs. Helmsley agreed under a voting agreement (the "Voting Agreement") between Leona Helmsley and Helmsley-Spear, dated September 24, 1997, to take all actions necessary—including voting her partnership interests in the Partnerships—to maintain Helmsley-Spear as the managing agent of those Partnerships. . . . Claimants argue that the Voting Agreement violates Section 53(1) of the New York Partnership Law because it gives Helmsley-Spear, a non-partner, irrevocable authority to vote Mrs. Helmsley's interest or to require her to vote issues as directed by a non-partner. . . .
>
> . . . .
>
> We disagree. The option agreement is of long standing, and plainly contemplated that Mr. Schneider and Mr. Schwartz would continue the Helmsley management of Helmsley-Spear. Mrs. Helmsley, as successor to Harry Helmsley, is merely carrying out that intention. Retention of Helmsley-Spear by the

> partnerships was something that Wien & Malkin as counsel built into each agreement to ensure that Helmsley-Spear would continue to be the managing agent. Indeed, it appears that Mr. Wien was concerned that Helmsley-Spear (or its successor) might fall into the hands of another third party, *i.e.*, if Irving Schneider did *not* exercise the option. After Mr. Schneider offered to accelerate, if possible, the option, Mr. Wien ultimately represented that he would not change the managing agents at the Garment Center Buildings as long as they were under Mr. Schneider's supervision. In 1992, Peter Malkin settled a previous arbitration seeking removal of Helmsley-Spear when assured that Messrs. Schneider and Schwartz would be active in its management.
>
> For these reasons we do not think that Section 53(1) of the New York Partnership law mandates the result that Claimants seek, . . . .

(R. 211-13.)

Petitioners' contention that the effect of the Panel's determination "is to perpetuate Helmsley-Spear indefinitely as managing agent" (*see* Petition at 4) is also wrong. The Voting Agreement itself contemplates that the level of service provided by Helmsley-Spear remain consistent. Thus, Mrs. Helmsley agreed to do precisely what was always envisioned by the parties: to retain Helmsley-Spear as managing agent and retain Irving Schneider as the executive at the Buildings; conversely, it was understood that Helmsley-Spear would maintain the level of management that had returned such spectacular results to the investors over 50 years. The Panel found these facts to be salient:

> Here, there is no claim that Helmsley-Spear seeks to become a partner, merely that Mrs. Helmsley, who

> is concededly a partner, agrees to vote to continue the existing relationship with the managing agent. This case, where a partner agrees to vote on a specific limited issue that has been considered of benefit to the partnership and is a part of the way it has done business for decades, *appears to be one of first impression*. We think it would vitiate the purpose of the option agreement not to give effect to the Voting Agreement. Although Claimants would surely disagree, the Voting Agreement as an aid to the option agreement furthers the interests of the partnership and the continuity of its business.

(R. 213-14 (emphasis added).)

With respect to the second "central" issue, Petitioners contended in the Arbitration that Helmsley-Spear acquired certain property management contracts, by way of an impermissible assignment. (*See* R. 209-10.) Again, that issue was hotly contested (*see* R. 1406-17), and the Panel soundly rejected Petitioners' contention:

> This analysis must start with our conclusion that Newco, renamed Helmsley-Spear, Incorporated, the Respondent in this case is the valid successor in interest of Helmsley-Spear, Incorporated. It achieves that status by virtue of an option agreement of 1970.
>
> In 1970 an option agreement was created which provided Messrs. Schneider and Schwartz the option to purchase the Helmsley's interest in Helmsley-Spear. Wien & Malkin drafted that agreement as well as the August 1974 and May 1977 amendments thereto. . . .
>
> The option agreements contemplated that Mr. Schneider and Mr. Schwartz would purchase the shares of Helmsley-Spear held by the Helmsleys

> after certain assets unrelated to the management and brokerage business had been removed. The parties to the 1997 transaction cast it as a purchase of the assets of the existing Helmsley-Spear corporation rather than a purchase of its stock. We are persuaded this change was merely one of form, done for tax reasons having to do with certain "parked" properties that are unrelated to the issues in this case. Claimants have not persuaded us that the change of form had any other consequences to the parties, to the partnerships or to Wien & Malkin. We find that the change of form is not a breach of any duty Helmsley-Spear owed to the partnerships and that Claimants' efforts to elevate this technical matter to a nullification of Helmsley-Spear's rights are without merit.

(R. 209-10.)[1]

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[1] In any event, not only was Helmsley-Spear a proper contractual and legal successor, but an assignment under the conditions identified by the Panel would have been proper because personal service contracts *may* be validly assigned where the alleged personal services continue to be rendered by the same or similar individual. *See Lipman v. Haeuser Shellac Co.*, 289 N.Y. 76, 43 N.E.2d 817 (1942) (agreement to arbitrate with corporation whose president discontinued doing business as corporation and operated business as individual was valid and enforceable due to similarity in operations); *In re Vann*, 78 A.D.2d 255, 434 N.Y.S.2d 365 (1st Dep't 1980) (rationale underlying prohibition of assignment of personal service contract inapplicable where the post-assignment services continue to be rendered in same manner as before assignment), *aff'd*, 54 N.Y.2d 936, 429 N.E.2d 817, 445 N.Y.S.2d 139 (1981).

## REASONS FOR DENYING THE PETITION

### I. THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO REVIEW THE STATE COURT DETERMINATION

Contrary to Petitioners' jurisdictional allegation, the Supreme Court does not have jurisdiction to review the state court's determination pursuant to 28 U.S.C. § 1257(a). That provision states:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, *or where any* title, *right*, privilege, or immunity *is specially set up or claimed under the* Constitution or the treaties or *statutes of*, or any commission held or authority exercised under, *the United States*.

28 U.S.C.A. § 1257(a) (West, WESTLAW through P.L. 108-59, (excluding P.L. 108-36) approved 7-14-03) (emphases added). In this case, Petitioners do not claim that this Court's jurisdiction is based upon the invalidity of any federal treaty or statute, or state statute. Rather, Petitioners claim that they were denied their federal right to a review of the arbitration Award pursuant to the FAA, and the federal judicially-created "manifest disregard of the law" doctrine.

The requirement that one seeking Supreme Court review of a state court decision must properly and timely "set up" the federal right claimed is a jurisdictional requirement that is strictly enforced. As stated in

the definitive treatise on United States Supreme Court practice:

> The admonition bears repeating "that if you are about to commence litigation [in a state court] in which there may be involved, then or ultimately, a question arising under the Constitution or laws of the United States, you must raise the federal question at the outset and not as an afterthought after you have lost below. By that time you are almost always too late. * * * [U]nless you build the record in your state litigation so that you *do* make a federal case out of it, you not only do not have a rosy chance of review, you don't have any chance at all."

Robert L. Stern et al., *Supreme Court Practice* 168-69 n.49 (8th ed. 2002) (quoting F. Wiener, *Wanna Make A Federal Case Out Of It?*, 48 A.B.A.J. 59, 60, 62 (1962)) (alterations, omission and emphasis in original).

Petitioners failed to timely set up their claimed federal right to FAA review in the state court litigation, and cannot now avail themselves of that purported right by petition to the Supreme Court. Indeed, Petitioners' contention that the arbitration Award should have been reviewed under the FAA (as opposed to review under Article 75 of the New York Civil Practice Law and Rules) is an after-the-fact invention, raised for the first time only after all of their claims were denied by the arbitration Panel. Recognizing as they must that the underlying dispute was a quintessentially localized dispute involving the management of real property in Manhattan by a New York corporation with its principal place of business in New York County,[2] Respondents

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[2] In their appeal to the Appellate Division, the *only* fact Petitioners relied upon to support their invocation of the FAA was the fact that the parties (or principals of parties) are from different states. As the Appellate Division recognized, that fact alone is not a sufficient

themselves proceeded under Article 75 of the CPLR from the very inception of the arbitration. Thus:

- In 1997, after Petitioners commenced the underlying dispute in New York Supreme Court, Respondent moved to compel arbitration pursuant to CPLR § 7503. (R.1479.) In opposing the motion, *Petitioners never argued that the FAA applied.* To the contrary, *every case they cited* in opposition to the motion was decided under the CPLR. (R. 1483.)
- While opposing the motion to compel, Petitioner argued to the lower state court that the injunctive relief they had previously sought under Article 63 of the CPLR would also be available to them as an injunction in aid of arbitration pursuant to CPLR § 7502. (R. 1484.) This remedy is not available under the FAA. (R. 1484.)
- In 1998, while discovery was proceeding in the arbitration, Petitioners sought from the Panel a partial/final award terminating Respondent at five of the eleven Buildings at issue. In arguing that the Panel had the authority to grant the relief requested, Petitioners relied on cases decided under Article 75 of the CPLR, and

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basis for application of the FAA. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956), *cited with approval in Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1955). In the instant application, Petitioners also allege that "national and international tenants" lease office and showroom space in the Buildings. (Petition at 5.) Similarly, Petitioners allege here that people from around the world visit the Empire State Building. *Id.* Apart from whether these allegations even demonstrate that the arbitral dispute has an effect on interstate commerce, these arguments were not presented to the Appellate Division or the lower court and cannot be raised here for the first time.

expressly told the Panel that "[t]here is no requirement in CPLR § 7510, *which governs confirmation of an arbitral award*, that a party have a final resolution of all issues prior to seeking confirmation. . . . " (R. 1487 (emphasis added).)

- When they brought an application before the lower state court in 2002 long after the conclusion of the Arbitration—to "confirm partnership votes"—without purchasing an index number and commencing a new plenary action, Petitioners agued that it was merely enforcing the arbitration Award, *and that a recent amendment to Article 75 of New York's CPLR* rendered the filing of a new action unnecessary.
- Petitioners did not raise the possible application of the FAA until 2001, as part of their cross-motion to vacate the Award in part. Even then, they argued that *both* the CPLR and the FAA supported vactatur.

For these reasons, the federal question was not properly set up and claimed, and the Supreme Court does not have jurisdiction over the state court judgment pursuant to 28 U.S.C. § 1257(a).

## II. APPLICATION OF THE FAA WOULD NOT CHANGE THE OUTCOME

Eager to keep this litigation alive, Petitioners contend that the Appellate Division's failure to apply the FAA's "manifest disregard of the law" "was almost certainly outcome determinative." (Petition at 8.) Petitioners are wrong.[3] Even if the FAA applied to this case, the Panel

[3] As a threshold issue, this Court need not even address Petitioners' contention that the Award should have been reviewed under the

did not act in manifest disregard of the law and the reviewing courts would have confirmed the Award. The 134-page Award demonstrates that the Panel afforded careful consideration to all of the parties' factual and legal contentions, and reflects a sophisticated analysis, as well as a complete and comprehensive understanding of both the proof adduced and the law.

The sole basis of Petitioners' argument that the application of the FAA to the Voting Agreement and management contract issues "was almost certainly outcome determinative" is the First Department's statement that the Panel's rulings in those respects were "perhaps questionable." (Petition at 7-8.) Petitioners' reliance on the "perhaps questionable" language, however, represents a fundamental misunderstanding of the nature and severely circumscribed application of the "manifest disregard of the law" doctrine, as explained in two recent Second Circuit decisions.

In *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200 (2d Cir. 2002) and *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383 (2d Cir. 2003), the Second Circuit reaffirmed that the "standard

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standards set forth in the FAA. This is so because "this State's [New York's] body of arbitration law would apply as it is not inimical to the policies of the FAA." *In re Ball (SFX Broad. Inc.)*, 236 A.D.2d 158, 160, 665 N.Y.S.2d 444, 446 (3d Dep't 1997), citing the New York Court of Appeals' decision in *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 205, 647 N.E.2d 1308, 1315, 623 N.Y.S.2d 800, 807 (1995). In *Smith Barney*, the New York Court of Appeals (the State's highest court) noted that "the FAA was modeled after New York's arbitration law" and held that "no significant distinction can be drawn between the policies supporting the FAA and the arbitration provisions of the CPLR." *Id.* at 205-06, 647 N.E.2d at 1315, 623 N.Y.S.2d at 807. Thus, because the policies underlying the FAA and CPLR are consistent, and because, as described herein, application of the FAA would have *no* effect on the outcome of this case, there is no basis to assert—as Petitioners appear to have done—FAA preemption.

of review under this judicially created doctrine is 'severely limited.' " *Westerbeke*, 304 F.3d at 208; *Duferco*, 333 F.3d at 389.[4] Fatal to Petitioner's application, both *Westerbeke* and *Duferco* reiterated that the manifest disregard doctrine "has both an objective and a subjective component." *Westerbeke*, 304 F.3d at 209; *Duferco*, 333 F.3d at 390. Thus, in *Westerbeke*, the Second Circuit held that in addition to being "utterly arbitrary" or "totally irrational" (essentially, the CPLR test applied by the Appellate Division), vacatur under the manifest disregard standard requires a component of arbitral misconduct:

> It is not enough that the moving party provide proof that the arbitrator was aware of the governing legal principle; there must also be a showing of intent. *See DiRussa*, 121 F.3d at 821-22 (explaining that the arbitrator must either knowingly "refuse[ ] to apply" or intentionally disregard[ ]" governing law). A party seeking vacatur must therefore demonstrate that the arbitrator knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it. *See Merrill Lynch*, 808 F.2d at 933 ("[T]he term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.").

304 F.3d at 217 (alterations in original).[5]

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[4] Indeed, there is a split among the federal circuits as to whether the "manifest disregard of the law" doctrine is even available as a basis for vacatur. *See Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) (judicially created doctrine of manifest disregard is not a proper basis to challenge an arbitral determination).

[5] *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986) (citations omitted);

In *Duferco*, the Second Circuit made it clear that it meant what it said in *Westerbeke*, when it said that the standard of review was "severely limited." 333 F.3d at 389. As the Court explained:

> Our reluctance over the years to find manifest disregard is a reflection of the fact that it is a doctrine of last resort—its use is limited only to those exceedingly rare instances where some *egregious impropriety* on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply. It should be remembered that arbitrators are hired by the parties to reach a result that conforms to industry norms and to the arbitrator's notions of fairness. To interfere with this process would frustrate the intent of the parties, and thwart the usefulness of arbitration, making it "the commencement, not the end, of litigation."
>
> . . . .
>
> [I]t is not our role to substitute our judgment for those of the arbitrators hired by the parties—this is why our standard for vacatur is so very high. We review only for a *clear demonstration* that the panel *intentionally* defied the law.

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*Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892 (2d Cir. 1985) (manifest disregard of the law requires " 'something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law' "); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) (in order to modify or vacate an award on manifest disregard grounds, "a court must find both that (1) 'the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether,' and (2) the 'law ignored by the arbitrators . . . [was] "well defined, explicit, and clearly applicable to the case" ' "), *cert. denied*, 522 U.S. 1049, 118 S. Ct. 695, 139 L. Ed. 2d 639 (1998) (quoting *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 112 (2d Cir. 1993)) (omission and alteration in original).

*Id.* at 389, 392-93 (quoting *Burchell v. Marsh*, 58 U.S. 344, 349, 15 L. Ed. 96 (1854)) (emphases added).

Application of the above standard to this case shows that the further adjudication Petitioners seek would be frivolous. For example, it is difficult to understand how Petitioners can even suggest that the Panel's ruling with respect to the Voting Agreement with Leona Helmsley constituted a manifest disregard of the law. (Petition at 9-10.) After careful analysis, the Panel found they were confronted with an issue of "first impression." (R. 213.) If the Panel believed that to be so—a Panel that consisted of three distinguished attorneys, including former United States Attorney General Nicholas deB. Katzenbach—it cannot be genuinely argued that this belief constituted any "egregious impropriety" or that the Panel *intentionally* refused to apply a well-defined and clearly governing principle of law that was known to them. That Petitioners have not validly challenged the Panel's evaluation that this issue presented a case of first impression simply underscores the complete inapplicability of the manifest disregard standard here.

Petitioners' argument fares no better with respect to the management agreements—which Petitioners contend were personal service contracts that were impermissibly assigned to Helmsley-Spear. (R. 42-45.) The Panel determined, however, *as a factual matter*, that Helmsley-Spear was a valid successor in interest—*not* an assignee—to those agreements. (R. 209.) Petitioners may disagree with this finding, but they cannot contend that the Panel committed an egregious impropriety—much less "intentionally defied the law"—in reaching this conclusion. Thus, the manifest disregard of the law doctrine, even if it were the applicable standard, would have no application to the Panel's decision with respect to this issue.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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